

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 9 July 2009

**Public Authority:** HM Revenue & Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BG

### Summary

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The complainant asked HM Revenue & Customs (HMRC) to provide him with information about the 'weeding' of his tax files. HMRC provided him with relevant information but, when HMRC denied holding more information, he complained to the Commissioner. The Commissioner found that the Council was excluded from its duty to respond to the request under section 1(1)(a) by virtue of the provisions of section 40(5)(a) because if the information were held, it would constitute the personal data of the complainant.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The complainant wrote to HMRC on 19 November 2007 saying:

*"I request that you confirm absolutely that no record exists in the Revenue as to weeding of my tax files held then at HW2 or thereafter Oxon and Bucks or any other method/ procedures or record exists as to the weeding of a personal tax file. (New FOI application regarding the above and kindly provide a narrative as to my files in the hands of HW2 and O&B [HMRC units])"*

He added, repeating a request first made in a letter to HMRC on 6 October 2006:

*"Regarding the chronology of events and the PCA [Parliamentary Commissioner for Administration, also known as the Parliamentary Ombudsman] report firstly you are*

*required to explain when, why and who authorised these sensitive documents to be removed from the taxpayer's file by confirming all the dates as to weeding from 1992 to date, this information is recorded by IR [Inland Revenue]."*

Also on 19 November 2007 the complainant told HMRC that he refuted their suggestion that earlier requests from him had been vexatious or repeated and denied that he should be refused information under section 14(1) of the Act.

3. Starting in 2002, HMRC began to "weed", i.e. remove superfluous or redundant material from manual tax records with the aim of meeting internally prescribed data quality standards by October 2007.
4. On 10 January 2008 the complainant asked HMRC to confirm the date in 2001/ 02 when his files had been weeded saying that there should have been a clear note of this kept within the files. On 20 May 2008 he asked HMRC when any weeding of his files took place during the period 1996 through to 2004.
5. The Commissioner has seen that there has been extensive correspondence between the complainant and HMRC over many years, including meetings with HMRC officers at local offices. The substantive issue prompting the correspondence dates back to a period between 1980 and 1991.
6. On 31 October 2006 HMRC sent to the complainant a copy of their relevant weeding retention and destruction strategies and weeding plans produced during the transitional period of Data Protection Act 1998 (the 1998 Act) implementation.
7. On 24 January 2007 HMRC told the complainant that they had already supplied the weeding plan requested by him. This was provided in October 2006. HMRC said that the local weeding plans were effectively a timetable by which local areas hoped to make compliant the papers that existed prior to implementation of the Data Protection Act 1998 (the 1998 Act) by implementing national retention schedules.

## **The Investigation**

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### **Scope of the case**

8. On 13 February 2008 and again on 14 February the complainant contacted the Commissioner to complain about the way his request for information regarding the weeding of his files had been handled, as it was this particular aspect that concerned him. The complainant specifically asked the Commissioner to consider what he saw as HMRC's failure to respond to the information request contained in his letter of 19 November 2007. In light of the correspondence described in paragraphs 6 and 7, this Decision Notice is concerned only with how the request for information relating to the complainant's own tax files was dealt with, rather than information on wider procedures involving general practice.

9. The Commissioner has investigated seven other freedom of information matters raised by the complainant. Only the weeding matter is the subject of this investigation and Notice.
10. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### Chronology

11. On 27 March 2008 the complainant told the Commissioner that HMRC instructions to staff required that a file which he referred to as form 133K (which HMRC say is the stationery number of a file cover, not a particular file reference) should be kept in each district for all lists, correspondence, etc relating to the disposal from a taxpayer's file and completed and then signed off by the duty records officer before the weeded matter proceeded to waste disposal. The complainant said that he regarded as vexatious HMRC's failure to provide him with the information which he believed should be available to them on a form 133K relating to his records, in particular the date when his personal files had been weeded.
12. On 1 April 2008 the Commissioner confirmed to the complainant that he would investigate the complainant's request to HMRC for information on when and how his tax files had been weeded. The Commissioner also notified HMRC.
13. On 21 January 2009 the complainant told the Commissioner that he had requested the weeding information from HMRC many times, adding that the two letters of 6 October 2006 and 17 November 2007 had been provided as specimen requests, but that HMRC had not responded to them.
14. On 25 February 2009 the Commissioner opened his investigation.
15. On 26 February 2009 HMRC told the Commissioner that provision of the weeding plans on 31 October 2006 had predated one of the requests complained about so that, in effect, he had asked for the information again after being provided with the answer. HMRC said that they did not record in the weeding plans exactly what was removed from each individual taxpayer's file and when it was removed. The background to the weeding plans had been the coming into force of the 1998 Act which had allowed Data Controllers a transitional period to make their old manual records compliant. HMRC local weeding plans had been really no more than a timetable by which that would be done. At their simplest they had been along the lines that *'files in number/alpha range X to be weeded by Month X/ Year Z'*. The complainant had been supplied with a copy of the plan for the area in which his file would have been held and had been provided with an explanation of the weeding plans on 24 January 2007.
16. On 18 March 2009 the complainant asked the Commissioner to note his letter of 27 March 2008, especially the references to form 133K which, he said, HMRC still used.
17. On 29 April 2009 the complainant asked the Commissioner wider issues about HMRC's form 133K. These queries were not germane to the Commissioner's investigation of this matter but it was open to the complainant to put them to HMRC and he was told this.

18. On 29 April 2009 the complainant wrote to the Commissioner expressing disappointment at the Commissioner's stance on the form 133K issue. The complainant said that he would write again to the Commissioner no later than 10 June 2009.
19. On 1 June 2009 the complainant emailed the Commissioner seeking confirmation that the report and documents he would provide in support of his complaint would be treated as totally private and absolutely confidential. On 2 June the Commissioner's staff told the complainant that he undertook to handle personal data in an appropriate manner, but as a public authority subject to the same information access legislation as every other public authority, the ICO could not give an absolute guarantee that in all circumstances all information could, or would, be withheld.
20. On 8 June 2009 the complainant asked the Commissioner to issue a Decision Notice.

## Analysis

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### Procedural matters

21. The request was for information that was about the weeding of the complainant's personal tax files. The Commissioner is satisfied that any information held in relation to the request would constitute the personal data of the complainant.
22. Personal data is defined in section 1(1) of the DPA as:  
*"... data which relate to a living individual who can be identified -  
(a) from those data, or  
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,  
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"*
23. As section 40(1) would apply to all of the requested information if held, the public authority was not obliged to comply with section 1(1)(a) by virtue of section 40(5)(a) of the Act. This states that the duty to confirm or deny "does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)".
24. The Commissioner has determined that the public authority was not obliged to confirm or deny whether it held the requested information by virtue of section 40(5) of the Act. This is on the basis that, if the information were held, it would constitute the complainant's personal data and would be exempt under section 40(1).

### The Decision

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25. The Commissioner found that the Council was excluded from its duty to respond to the request under section 1(1)(a) by virtue of the provisions of section 40(5)(a), because if the information were held, it would constitute the personal data of the complainant.

## Steps Required

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26. The Commissioner requires no steps to be taken.

## Other Matters

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27. It would be open to the Commissioner not to make a decision under section 50(2)(a) of the Act as there had been no internal review by HMRC. However, from the supporting correspondence, and having regard to other matters put to him for decision by the complainant, the Commissioner is satisfied that for him now to ask HMRC to conduct a review would serve no useful purpose. Accordingly he proceeded to a decision.
28. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as the right of Subject Access. The Commissioner notes that this request should have been dealt with as a subject access request, under section 7 of the DPA from the outset, and he would encourage public authorities to consider requests under the correct access regime at first instance.
29. The Commissioner will now go on to consider whether or not to make an assessment under section 42 of the DPA. However, this consideration will be dealt with separately and will not form part of this Decision Notice, because any assessment under section 42 of the DPA that might take place would be a separate legal process from the consideration of a complaint under section 50 of the FOI Act.

## Right of Appeal

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30. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 9<sup>th</sup> day of July 2009**

**Signed .....**

**Lisa Adshead  
Senior Fol Policy Manager**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal annex

### General Right of Access

**Section 1(1)** provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

### Vexatious or Repeated Requests

**Section 14(1)** provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious”

**Section 14(2)** provides that –

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request.”

### Personal information.

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

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### **Application for decision by Commissioner**

**Section 50** provides that:

“(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—

- (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45, ... ”



## **Data Protection Act (1998)**

### 7. Right of access to personal data

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of—

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form—

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

(2) A data controller is not obliged to supply any information under subsection (1) unless he has received—

(a) a request in writing, and

(b) except in prescribed cases, such fee (not exceeding the prescribed maximum) as he may require.

(3) A data controller is not obliged to comply with a request under this section unless he is supplied with such information as he may reasonably require in order to satisfy himself as to the identity of the person making the request and to locate the information which that person seeks.

(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—

(a) the other individual has consented to the disclosure of the information to the person making the request, or

(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

(5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can

be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

(6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—

- (a) any duty of confidentiality owed to the other individual,
- (b) any steps taken by the data controller with a view to seeking the consent of the other individual,
- (c) whether the other individual is capable of giving consent, and
- (d) any express refusal of consent by the other individual.

(7) An individual making a request under this section may, in such cases as may be prescribed, specify that his request is limited to personal data of any prescribed description.

(8) Subject to subsection (4), a data controller shall comply with a request under this section promptly and in any event before the end of the prescribed period beginning with the relevant day.

(9) If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request.

(10) In this section—

“prescribed” means prescribed by the Secretary of State by regulations;

“the prescribed maximum” means such amount as may be prescribed;

“the prescribed period” means forty days or such other period as may be prescribed;

“the relevant day”, in relation to a request under this section, means the day on which the data controller receives the request or, if later, the first day on which the data controller has both the required fee and the information referred to in subsection (3).

(11) Different amounts or periods may be prescribed under this section in relation to different cases.

#### 42 Request for assessment

(1) A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act.

(2) On receiving a request under this section, the Commissioner shall make an assessment in such manner as appears to him to be appropriate, unless he has not been supplied with such information as he may reasonably require in order to—

- (a) satisfy himself as to the identity of the person making the request, and

(b) enable him to identify the processing in question.

(3) The matters to which the Commissioner may have regard in determining in what manner it is appropriate to make an assessment include—

(a) the extent to which the request appears to him to raise a matter of substance,

(b) any undue delay in making the request, and

(c) whether or not the person making the request is entitled to make an application under section 7 in respect of the personal data in question.

(4) Where the Commissioner has received a request under this section he shall notify the person who made the request—

(a) whether he has made an assessment as a result of the request, and

(b) to the extent that he considers appropriate, having regard in particular to any exemption from section 7 applying in relation to the personal data concerned, of any view formed or action taken as a result of the request.